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# Patterson v. State Appellant's Brief Dckt. 44880

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

NEIL G. PATTERSON,	)	
	)	NO. 44880
Petitioner-Appellant,	)	
	)	BANNOCK COUNTY NO. CV 2016-181
v.	)	
	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
	)	
Respondent.	)	
_____	)	

**BRIEF OF APPELLANT**

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF BANNOCK**

**HONORABLE ROBERT C. NAFTZ**  
District Judge

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## STATEMENT OF THE CASE

### Nature of the Case

Neil Patterson contends the district court abused its discretion when it denied his motion to appoint post-conviction counsel because that decision was not made in accordance with the applicable legal standards. In the district court's own words, it "denied the Petitioner's request for the appointment of counsel *because* this Court determined the Petitioners claims were without merit." (R., p.103 (emphasis added).) However, the Idaho Supreme Court has made it eminently clear that "[b]y not specifically addressing the appointment of counsel issue *before dealing with* the substantive issues of [the] Petition, the district court abuses its discretion." *Charboneau v. State*, 140 Idaho 789, 793 (2004) (emphasis added).

Under the proper standard, post-conviction counsel should have been appointed because Mr. Patterson asserted the possibility of a valid claim – that trial counsel was ineffective due to his improperly promising Mr. Patterson would receive a particular sentence in exchange for pleading guilty. As a result, this Court should vacate the judgment dismissing Mr. Patterson's petition and remand this case for further proceedings after post-conviction counsel is appointed to represent Mr. Patterson.

### Statement of the Facts and Course of Proceedings

In the underlying criminal case, Mr. Patterson entered a guilty plea to felony driving under the influence pursuant to a plea agreement. (R., pp.4-5.) In exchange, the State agreed to dismiss a persistent violator enhancement. (*See* R., p.35.) The district court imposed a unified term of six years, with two years fixed, and retained jurisdiction. *State v. Patterson*, 2016 Unpublished Opinion No. 657, Docket No. 43899 (Ct. App. 2016) (holding the district court did

not abuse its discretion by imposing an excessive sentence). The district court ultimately relinquished jurisdiction. *Id.*

Mr. Patterson subsequently filed a petition for post-conviction relief, in which he alleged, *inter alia*, that his guilty plea had been coerced by defense counsel. (R., pp.6, 8-9.) In his affidavit in support of his petition, he stated that he felt coerced by trial counsel's statements, particularly as those statements related to trial counsel's efforts to get the persistent violator enhancement off the table. (R., pp.8-9.) In response to the State's ensuing motion for summary dismissal, he expounded on that allegation, asserting that trial counsel had promised his sentence would result in his participation in the CAPP rider program followed by probation after successful completion of that program, but that he had ultimately been placed in the traditional rider program before jurisdiction was relinquished.<sup>1</sup> (R., p.63.) He argued this amounted to a coercive and improper promise of a particular sentence. (*See* R., p.63.) Mr. Patterson also moved for the appointment of post-conviction counsel. (R., pp.21-23.)

The State moved for summary dismissal of the petition, asserting Mr. Patterson had presented no evidence to support his assertion that defense counsel had coerced his guilty plea. (R., pp.69-70.) It also attached a copy of the questionnaire Mr. Patterson had filled out when he entered his guilty plea, and argued it disproved his claims.<sup>2</sup> (R., pp.70, 74-79.)

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<sup>1</sup> Unlike his initial petition, Mr. Patterson's response to the State's motion for summary dismissal was not notarized. (*See* R., p.7; *see generally* R., pp.61-68.)

<sup>2</sup> Although the guilty plea questionnaire was attached to the State's motion, the district court did not formally grant the State's implicit request for the district court to take judicial notice of either that document or the other documents the State attached to its filings. (*See* R., pp.44-54; *see generally* R.) To make such documents part of the post-conviction record, the district court must specify which documents and exhibits of which it is taking judicial notice. *See, e.g.*, I.R.E. 201(c)-(d); *Taylor v. McNichols*, 149 Idaho 826, 835-36 (2010); *Roman v. State*, 125 Idaho 644, 648 (Ct. App. 1994). However, it appears the district court implicitly took judicial notice of those documents, as it referenced the guilty plea questionnaire, for example, in its order dismissing the petition. (*See, e.g.*, R., p.99.) As a result, a motion for this Court to take judicial

The district court ultimately granted the State's motion and summarily dismissed Mr. Patterson's petition. (R., pp.88-104.) As to the substantive merits of the coercion claim, it concluded Mr. Patterson had failed to substantiate his claim with the requisite affidavits, records, or other evidence. (R., p.98.) It also concluded that claim was disproved by Mr. Patterson's answers in the guilty plea questionnaire, as his recitation of the sentence recommendation the State agreed to make (for ten years, with four years fixed) did not mention a promise for a CAPP rider, and he had answered "No" to the question about whether anyone had made promises or was forcing him to plead guilty. (R., p.99.) As such, the district court concluded: "This Court denied the Petitioner's request for the appointment of counsel because this Court determined the Petitioner's claims were without merit." (R., p.103.)

Mr. Patterson filed a notice of appeal timely from the final judgment. (*See* R., pp.106, 108-10; Order Granting Motion [to Withdraw Dismissal Order and Reinstate Appeal], dated May 1, 2017.)

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notice of the documents the State attached to its filings has been filed contemporaneously with this brief.

## ISSUE

Whether the district court abused its discretion by denying Mr. Patterson's motion for appointment of post-conviction counsel based on its consideration of the substantive merits of his petition, rather than ruling on the motion for appointment of counsel first, as required by Idaho Supreme Court precedent.



## ARGUMENT

### The District Court Abused Its Discretion By Denying Mr. Patterson’s Motion For Appointment Of Post-Conviction Counsel Based On Its Consideration Of The Substantive Merits Of His Petition, Rather Than Ruling On The Motion For Appointment Of Counsel First, As Required By Idaho Supreme Court Precedent

The Idaho Supreme Court has made it clear that, “[b]y not specifically addressing the appointment of counsel issue *before dealing with* the substantive issues of [the] Petition, the district court abuses its discretion.” *Charboneau v. State*, 140 Idaho 789, 793 (2004) (emphasis added); *see also State v. Hedger*, 115 Idaho 598, 600 (1989) (when reviewing for an abuse of discretion, the appellate court considers: (1) whether the district court recognized the issue was one of discretion; (2) whether it acted within the bounds of that discretion and consistent with the applicable legal standards; and (3) whether it reached its decision in an exercise of reason). The reason the district court must address the appointment-of-counsel issue first is because that issue is assessed under a different, lower standard than the substantive merits of the petition. *See, e.g., Swader v. State*, 143 Idaho 651, 655 (2007).

The standard for determining whether to appoint post-conviction counsel under I.C. § 19-4904 only requires the petitioner to “allege[] facts to raise the possibility of a valid claim.”<sup>3</sup> *Charboneau*, 140 Idaho at 793. At that point, the district court should “give the petitioner an opportunity with counsel to properly allege the necessary supporting facts.” *Id.* Having provided that opportunity to perfect the possibly-valid claim, the district court will have sufficient information to properly assess the substantive merits of the petitioner’s claims and

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<sup>3</sup> A valid claim of ineffective assistance of counsel would contend that trial counsel’s performance was objectively deficient and was prejudicial to the petitioner. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984).

determine whether (still considering all the inferences in the light most favorable to the petitioner) he has presented a genuine issue of material fact. *See id.* at 792-93.

The reason for these different standards, according to the Idaho Supreme Court, is to address the realities that exist in *pro se* petitions for post-conviction relief: ““petitions and affidavits filed by a *pro se* petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the *pro se* petitioner simply does not know what are the essential elements of a claim.”” *Charboneau*, 140 Idaho at 793 (quoting *Brown v. State*, 135 Idaho 676, 679 (2001)).

The district court failed to follow the Idaho Supreme Court’s clear instructions in its consideration of Mr. Patterson’s motion for appointment of post-conviction counsel. Rather, it “denied the Petitioner’s request for the appointment of counsel *because* this Court determined the Petitioner’s claims were without merit.” (R., p.103 (emphasis added).) Thus, by its own words, it began its considerations with the substantive merits of Mr. Patterson’s claims, and after that, considered whether to grant his motion for appointment of post-conviction counsel in light of its conclusions on the substantive merits. That is exactly the opposite of what it was supposed to do.

As a result of this abuse of the district court’s discretion, this Court should vacate the judgment summarily dismissing Mr. Patterson’s petition, especially since his filings, considered under the proper standard, do assert the possibility of a valid claim. Specifically, he claimed trial counsel had coerced his guilty plea. (R., pp.6, 8-9.) He asserted trial counsel did so by promising, as part of his sentence, he would participate in the CAPP rider program, and ultimately, be placed on probation, but those promises were not fulfilled. (R., p.63.)

The United States Supreme Court has recognized that trial counsel may perform deficiently by promising a particular sentence, and, if allegations that such a promise was made are true, the petitioner “is entitled to have his sentence vacated.” *Machibroda v. United States*, 368 U.S. 487, 493 (1962); *see, e.g., Wellnitz v. Page*, 420 F.2d 935, 936 (10th Cir. 1970) (succinctly summarizing this rule as: “if an attorney recklessly promises his client that a specific sentence will follow upon a guilty plea, . . . the question may arise whether such assurances were coercive, or whether such representation may be deemed constitutionally ineffective”); *cf. Davidson v. State*, 92 Idaho 104, 105-06 (1968) (pointing out that good-faith advice from counsel about the likely outcome at sentencing, without more, is not sufficient to establish coercion). Therefore, Mr. Patterson’s assertion – that trial counsel promised him a particular sentence – identifies *the possibility* of a valid claim because, if he could prove that assertion, he would be entitled to relief.

It is true, as the district court pointed out, that Mr. Patterson did not present evidence in support of his assertion regarding the details of trial counsel’s promise. (*See R.*, p.98.) That is because his response to the State’s motion for summary dismissal (in which he articulated those details) was not notarized, nor was it accompanied by affidavits establishing the facts referenced therein. (*See generally R.*) Still, he did allege facts relevant to his claim, such as, that he felt coerced by trial counsel’s statements regarding the plea. (*R.*, pp.8-9.) The details of trial counsel’s statements to Mr. Patterson which demonstrate the coerciveness are simply additional facts to which he could, with the assistance of counsel, properly attest. *See Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993) (also noting that the allegations of the petitioner alone can establish a genuine issue of material fact). That is, after all, part of the purpose of appointing

post-conviction counsel: to “give the petitioner an opportunity with counsel *to properly allege the necessary supporting facts.*” *Charboneau*, 140 Idaho at 793 (emphasis added).

As such, the district court’s reliance on the lack of factual support to justify denying Mr. Patterson’s request for counsel is improper and illustrates the flaw of using the wrong standard to assess the request for counsel. While the lack of evidence may show that a claim, on its substantive merits, fails to raise a genuine issue of material fact, the assertion Mr. Patterson made still raises *the possibility* that, with the assistance of post-conviction counsel, the petitioner could yet provide the appropriate facts to support the claim, and so, he should still be appointed counsel. *Charboneau*, 140 Idaho at 793. However, the backward way in which the district court approached this case took away that opportunity to perfect his possibly-valid claims. As such, the district court’s decision to deny the motion for appointment of post-conviction counsel is not consistent with the applicable legal standards. Therefore, it is an abuse of the district court’s discretion.

The district court also based its decision on the substantive merits on the fact that Mr. Patterson had, on the guilty plea questionnaire, responded in the negative to the question about whether anyone had made promises about the sentence if he pled guilty.<sup>4</sup> (R., p.99.) However, as the Idaho Supreme Court has indicated, such information (that the defendant was otherwise made aware of the underlying reality of his situation) has no impact on the analysis

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<sup>4</sup> The district court also pointed to the fact that Mr. Patterson’s recitation about the sentence recommendation the State agreed to make, which did not mention a promise about the Rider programs, as disproving his claim. (R., p.99.) However, that point is irrelevant not only to the question of whether counsel should have been appointed, but to the merits of the claim as well. What the State agreed to recommend has no impact whatsoever on whether or not *defense counsel* promised Mr. Patterson that he would ultimately receive a different sentence. That would, regardless of the State’s recommendation or the defendant’s understanding thereof, still be deficient performance by the attorney. See *Machibroda*, 368 U.S. at 493.

under the deficiency prong of *Strickland*. See, e.g., *Murray v. State*, 156 Idaho 159, 166-67 (2014) (“the district court’s actions in informing Murray of his *Estrada* rights<sup>5</sup> do not affect the Court’s analysis under the deficiency prong of *Strickland*.”) Thus, the fact that the district court may have, through its questionnaire, discussed this matter with Mr. Patterson does not eliminate trial counsel’s obligations to properly and effectively advise Mr. Patterson about what accepting the plea agreement means or whether it is a worthwhile course of action (as opposed to exercising the right to a trial). See *id.* As such, that fact does not mean Mr. Patterson failed to allege *the possibility* of a valid claim.

Mr. Patterson recognizes that, in *Murray*, the Supreme Court ultimately concluded that the district court’s advice to the petitioner about his rights meant he had not shown prejudice under the second prong of *Strickland*. See *Murray*, 156 Idaho at 167. However, in reaching that conclusion, the *Murray* Court relied on the transcript of the change of plea hearing in that case, which showed the petitioner was given the opportunity to discuss the issue with trial counsel after the district court identified it. See *id.* at 167-68. Here, though, no such transcript was proffered to the district court nor is there an indication the district court took judicial notice of a transcript *sua sponte*. (See generally R.) As such, the post-conviction record in this case does not indicate any such discussion took place between Mr. Patterson and his attorney, and so, there is still *the possibility* that Mr. Patterson could, with the assistance of post-conviction counsel, make out a valid allegation of prejudice resulting from trial counsel’s deficient performance.<sup>6</sup> See *Charboneau*, 140 Idaho at 793 (explaining that, in such cases, the district court should “grant the petitioner the opportunity with counsel to properly allege the necessary supporting facts”).

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<sup>5</sup> *Estrada v. State*, 143 Idaho 558 (2006).

On this point, it is important to remember the Idaho Supreme Court's admonition that a *pro se* petition might not include such facts, not because they do not exist, but simply because the *pro se* petitioner is unaware that he needs to allege them as part of the claim he is trying to make. *Brown*, 135 Idaho at 679. It is also important to remember the Idaho Supreme Court's further admonition that the potential results of the appointed attorney's investigation of the possible claim are irrelevant to the determination of whether counsel should be appointed in the first place. *Swader*, 143 Idaho at 655 ("The investigation by counsel may not produce sufficient evidence to survive a motion to dismiss. But, the decision to appoint counsel and the decision on the merits of the petition if counsel is appointed are controlled by two different standards.") With both those admonitions in mind, Mr. Patterson's claim does not fail for the reasons the claim in *Murray* failed.

Therefore, despite his answers on the questionnaire, Mr. Patterson's petition still identifies *the possibility* of a valid claim, which is all he needs to identify in order to justify appointment of counsel under I.C. § 19-4904. *Charboneau*, 140 Idaho at 793. As before, the district court's rationale is only relevant to the determination of whether the allegations, on their substantive merits, set forth a genuine issue of material fact. However, such a determination on the merits cannot, according to the Idaho Supreme Court, happen until after the district court completes the first step of determining whether counsel needs to be appointed. *Id.* As such, the district court abused its discretion by, directly contrary to the applicable Idaho Supreme Court precedent, ruling on the merits of Mr. Patterson's allegations before ruling on his request for appointment of post-conviction counsel to assist him in developing those allegations.

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<sup>6</sup> For example, Mr. Patterson might be able to allege that, as part of the alleged effort to coerce the guilty plea, trial counsel instructed him to answer that particular question as he did, telling him he had to answer that way if he wanted the judge to accept his plea.

CONCLUSION

Mr. Patterson respectfully requests this Court vacate the judgment dismissing his petition and remand this case for further proceedings after post-conviction counsel is appointed to represent him.

DATED this 31<sup>st</sup> day of July, 2017.

\_\_\_\_\_/s/\_\_\_\_\_  
BRIAN R. DICKSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31<sup>st</sup> day of July, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

NEIL G PATTERSON  
12112 E VALLEY WAY  
SPOKANE WA 99206

ROBERT C NAFTZ  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BRD/eas